The Law

Is it socialism? Or something worse?

Democrats seek control over every pond, puddle, and ditch across America.

M. REED HOPPER

A great deal of rhetorical energy has been expended, beginning before and continuing after the November election, on the question whether the ideology installed with Democrat control of Congress and the White House might fairly be called "socialist." Considering such Democrat-favored policies as the Pacific Legal Foundation's Mr. Hopper describes in this article, a more to-the-point question might be whether the term "socialist" — which at least implies some respect for rule of law — is in fact strong enough to describe the framework guiding the radical minority in charge of Democrat policy-making. As part of our overall focus on state and federal water regulation policy in this issue of CPR, *we include Mr. Hopper's exposition of a congressional effort to overturn a recent landmark Supreme Court decision protecting property rights against bureaucratic over-reach. On the issue of water policy and its legal, political, and economic implications for California and America, see also, in this issue: M. David Stirling's "Man-Made Drought," (page 13) and "California's Upcoming Water Revolt," by Shawn Steel (page 18).*
— editor

Since the U.S. Supreme Court's landmark decision in *John Rapanos v. United States* (2006), in which the Supreme Court did its job in limiting federal jurisdiction under the Clean Water Act, "big government" members of Congress and litigious environmentalist groups have breathlessly declared our nation's waters at imminent risk of uncontrolled pollution. Overheated Representatives Henry Waxman (D-California) and James Oberstar (D-Minnesota) repeatedly charge that, following *Rapanos*, the Environmental Protection Agency's (EPA) Clean Water Act enforcement is "faltering" because the agency dropped more than 300 cases on grounds it no longer had jurisdiction. The Environmental Defense Fund has condemned *Rapanos* as "impractical and overreaching" and declared EPA's post-*Rapanos* regulations "ecologically irresponsible" and certain to "put America's waterways and wetlands at risk."

It is inconceivable to these lawmakers and hardcore environmentalists that the EPA had far exceeded its authority by regulating every pond, puddle, and ditch in the nation prior to *Rapanos*. But the High Court was right to set some limits on federal authority and, in fact, limits are required by the Constitution, by state sovereignty, court precedent, the "rule of law," and the Clean Water Act itself. Given the EPA's prior claim that it could regulate virtually all "non-navigable" water bodies in the country (whereas the Clean Water Act only authorizes federal regulation of "navigable" waters), it is

The bureaucrats strike back

Reed Hopper, a principal attorney with the Pacific Legal Foundation, successfully represented John Rapanos in the U.S. Supreme Court. Pacific Legal Foundation (www.pacificlegal.org) *is the nation's oldest and most successful public-interest legal organization dedicated to limited government, protection of property rights, and individual freedom.*

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surprising the agency did not drop *more* cases for lack of jurisdiction after *Rapanos*. Congressmen Waxman and Oberstar, and organizations like the Environmental Defense Fund, are trying to drum up support for proposed legislation called the Clean Water Restoration Act.

THIS PROPOSAL overreaches. It is being sold on the patently false claim that Congress always intended that federal officials should control the use of every wet spot in the country (and much of the dry land too). In the Clean Water Act, Congress expressly recognized "the primary responsibilities and rights of the States" to eliminate pollution and to determine locally the "development and use ... of land and water resources." The proposed Clean Water Restoration Act goes far beyond Congress's original intent. It is designed to expand federal authority to an extreme level never seen before in American history. It authorizes federal bureaucrats to control "all water" in the United States, whether private or public, state or federal. You have a pond or ditch in your backyard? Don't be surprised if the feds come knockin'.

Waxman and Oberstar want to make the Supreme Court the villain here, but the real offender is heavy-handed federal regulation, which would only increase under the proposed legislation. Even after *Rapanos*, federal officials are still expanding their regulatory reach. For example, they now say the frozen permafrost under a planned children's park in Fairbanks, Alaska, meets the definition of "navigable waters" under the Act and must be regulated by the federal government. Disproving the charge of "faltering," EPA continues to impose severe civil and criminal penalties on landowners by declaring the placement of clean dirt on mostly dry land the equivalent of a discharge of a pollutant into "navigable waters."

If *Rapanos* has finally brought the EPA kicking and screaming to a realization it routinely exceeded its authority in the past, so much the better. We can hope to

WHAT YOU HAVEN'T BEEN TOLD ABOUT GUN CONTROL

By SAM PAREDES

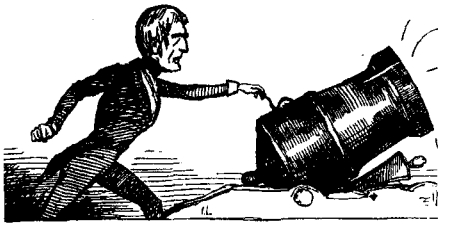
Behold, I tell you a mystery. We shall not all sleep.

— 1 Corinthians, 15:50-52

Although this Scripture reference regards end-times, it is an apt description of today. As a general movement, conservatives lost a lot of ground in the 2008 elections, nationally and here in California. At the federal level, we could be facing a new dark age. Here in California, we can see at least a twinkling of light. How? — you may well ask, while licking the wounds of having lost three Republican seats (net) in the Assembly and barely hanging on to an already meager *status quo* in the Senate. Well, it depends on issues and where we find conservative political strength at the state level.

Sam Paredes is executive director of Gun Owners of California.

California defenders of the Second Amendment can see an immediate future that is bright. We did not sleep; we zeroed in on a few elections — races that were really in play. The outcome brought us a split in the Assembly, but we won our most important Senate race, an outcome key to deciding Second Amendment issues in the new Legislature. Here's why: new laws require 41 Assembly and 21 Senate votes to pass. That makes the magic number 20 senate votes to avoid bad new laws — not 20 votes our way; just 20 *not* going against us. We have 15 Senate Republicans



(with near-perfect gun vote records) plus four Democrats at least sympathetic to the Second Amendment. With fanatically anti-gun Senator Mark Ridley-Thomas gone (he's an L.A. County Supervisor), his vacant seat means 20 votes are *not* available to the anti-gunners. So anti-gun bills can be stopped in the state Senate.

The key, of course, is participation in elections. Lobbying alone isn't enough. Doing elections is a lot of work, of course, and is often frustrating, but no substitute for it exists. It demands laser-like focus, dogged attention to detail, some common sense, and usually a little luck. (Hats off, by the way, to Yes on Prop. 8 for *their* victory.) Conservatives too often try to win in Sacramento without first winning in the polling booth. It rarely works.